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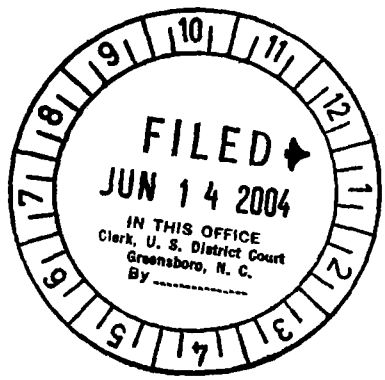
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

MARK A. WARD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:02CV00467
	)	
PETER E. MALONEY, Plan Administrator,	)	
	)	
Defendant.	)	



MEMORANDUM OPINION

OSTEEN, District Judge

Plaintiff Mark A. Ward brought this action challenging Defendant Peter E. Maloney's denial of benefits under a retirement plan governed by the Employee Retirement Income Security Act ("ERISA") 29 U.S.C. § 1001 et seq. Now pending before the court are Defendant's Motion for Summary Judgment and Plaintiff's Cross-Motion for Summary Judgment.[1] For the reasons

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[1] In his response to Plaintiff's cross-motion, Defendant notes that Plaintiff has failed to provide notice of his intent to file a dispositive motion, see LR 56.1(a), and has filed his motion too late after the close of discovery, see LR 56.1(b). Plaintiff responds that filing a cross-motion for summary judgment is a proper form of response to a motion for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, and, in any event, is not governed by Local Rule 56.1. Regardless of whether Rule 56(c) permits this type of filing, Local Rule 56.1 is clear that it applies to "dispositive motions" of which cross-motions for summary judgment are clearly contemplated. Compliance with the Local Rules is critical to the proper and timely functioning of the court. See, e.g., Boyles v.

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herein, Defendant's motion will be granted and Plaintiff's motion will be denied.

I. BACKGROUND

Plaintiff is a former employee of WAVY-TV, an affiliate of LIN Broadcasting Corporation. Although Plaintiff separated from WAVY-TV in 1993, he remains a participant in the LIN Broadcasting Corporation Retirement Plan (the "Plan"), of which Defendant is plan administrator.

In January 2002, Plaintiff submitted a request for disability benefits under the Plan to Defendant, asserting that he had become disabled in 1997. Reviewing the evidence submitted by Plaintiff, Defendant denied benefits on January 22, 2002. Plaintiff sought to appeal the decision, but before a medical evaluation by a doctor chosen by Defendant could take place, Plaintiff filed this action in state court. On June 12, 2002, Defendant removed the action to this court. Now pending are motions for summary judgment filed by both parties.

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[1](...continued)
United States, 171 F. Supp. 2d 556, 559 (M.D.N.C. 2001) ("[I]t has long been the standard policy of the judges of this Court that motions which are not filed in accordance with the requirements of the Local Rules will not be considered except in extraordinary circumstances."). Despite the importance of complying with the Local Rules, the court may consider an untimely motion if "its consideration will not cause delay to the proceedings." LR 56.1(g). In this case, since the court is currently addressing Defendant's motion and the issues raised in Plaintiff's motion are essentially the same, the court will, in its discretion, consider Plaintiff's untimely motion.

II. ANALYSIS

A. Standard of Review

Summary judgment is appropriate where an examination of the pleadings, affidavits, and other proper discovery materials before the court demonstrates that there is no genuine issue of material fact, thus entitling the moving party to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986). The basic question in a summary judgment inquiry is whether the evidence "is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512 (1986). Summary judgment should be granted unless a reasonable jury could return a verdict in favor of the nonmovant on the evidence presented. McLean v. Patten Communities, Inc., 332 F.3d 714, 719 (4th Cir. 2003) (citing Anderson, 477 U.S. at 247-48, 106 S. Ct. at 2509-10).

In order to determine the standard of review for reviewing a denial of benefits under ERISA, a court must first determine whether the language of the plan grants the administrator discretion to determine the claimant's eligibility for benefits. Gallagher v. Reliance Standard Life Ins. Co., 305 F.3d 264, 268 (4th Cir. 2002). If the plan grants discretion to the administrator, the standard of review is abuse of discretion. Feder v. Paul Revere Life Ins. Co., 228 F.3d 518, 522 (4th Cir. 2000). If, on the other hand, the plan does not grant

discretion, this court's review of the decision is de novo. Gallagher, 305 F.3d at 268. Rather than requiring the use of "specific phrases" in a plan to grant discretion, the Fourth Circuit considers whether "the terms of a plan indicate a clear intention to delegate final authority to determine eligibility to the plan administrator." Feder, 228 F.3d at 522-23.

In this case, the Plan defines Disability as follows:

> [p]hysical or mental incapacity which is likely to be permanent and which prevents a Participant from engaging in any occupation or performing any work for compensation or profit for which he is qualified by education, training or experience, as determined by the Committee[2] in its sole discretion on the basis of medical evidence certified by a physician or physicians certified by it.

(Def.'s Mot. Summ. J. Ex. C1 at 3-4.)

The use of the phrase "in its sole discretion" seems designed to ensure that courts would conclude this language creates a discretionary decision. Moreover, this language appears to create a subjective standard, leaving any decisions to Defendant. See Elliott v. Sara Lee Corp., 190 F.3d 601, 605 & n.4 (4th Cir. 1999) (holding that a plan requiring that all proof submitted in support of a claim "be acceptable to the

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[2] The "Committee" referred to is a group of at least three people appointed by the Board of Directors of LIN Broadcasting to govern the Plan. (See Def.'s Mot. Summ. J. Ex. C1 Art. IX.) Although the definition of Disability indicates that the Committee determines eligibility for benefits, the Committee can delegate its authority to an individual, with claimants having a right of appeal to the Committee itself. (Id. Art. X.) In this case, Defendant was the individual designated by the Committee to exercise its authority in making initial eligibility determinations.

administrator, which shall have sole discretion in determining the acceptability of such proof" created discretionary authority). But see Gallagher, 305 F.3d at 269 (concluding that plan language stating "[w]e will pay a Monthly Benefit if the Insured . . . submits satisfactory proof of Total Disability to us" created an objective, non-discretionary standard) (alteration in original); Feder, 228 F.3d at 523 (holding that a requirement to submit written proof of disability and "proof to verify the continuance of any disability" established an objective standard). Because the court concludes that the Plan in this case does grant Defendant discretion in making benefit decisions, his decision will be reviewed for abuse of discretion.

B. Plaintiff's Eligibility for Benefits

Defendant first argues that, as a matter of law, Plaintiff is not eligible for benefits under the Plan. In general, the Plan provides that benefits commence on the first day of the month following the month in which a participant turns 65 or the month in which he retires, if after the participant turns 65. (Def.'s Mot. Summ. J. Ex. C1 ¶ 6.1(a).) A participant may elect to receive benefits early, although they will be reduced according to a formula set forth in the Plan. (Id. ¶ 6.2.) A third option applies "in the case of a Participant who terminates his Service on a Disability Retirement Date." (Id. ¶ 6.1(b).) The "Disability Retirement Date" is defined by the Plan as "[a]ny day prior to a Participant's Normal Retirement Date or Early Retirement Date, but subsequent to his completion of ten Years of

Vesting Service and his attainment of age 45, on which he retires or is retired because of Disability." (Id. at 4 (emphasis added).) Plaintiff ceased working for WAVY-TV in 1993 and his request for benefits indicates that his disability began in 1997, so there is no dispute that Plaintiff did not retire "because of Disability."

Plaintiff points to the language of the Summary Plan Description ("SPD"), a document provided to employees to explain their benefits under the Plan, which indicates that "[i]f you become disabled, you can receive unreduced benefits from the plan, even if payments begin before age 65." (Pl.'s Mem. Opp'n Summ. J. Ex. 1 at 2.) This language, Plaintiff argues, indicates that a participant need not be an active employee when he becomes disabled to receive disability benefits under the Plan. By its own terms, however, the SPD does not control the language of the Plan, nor does the SPD constitute a contract between Plaintiff and LIN Broadcasting. (Def.'s Mot. Summ. J. Ex. C2 at 32.) The language of the Plan is clear. For a participant to receive disability benefits, he must retire on his Disability Retirement Date, which is a date he retires "because of Disability." Plaintiff, having retired long before he asserts his disability began, does not meet this requirement.

Despite this conclusion, the court cannot grant summary judgment for Defendant on these grounds. When Defendant denied Plaintiff's claim, he cited four primary reasons for doing so. Defendant noted that Plaintiff had failed to file a claim for

benefits with the Social Security Administration, that the records Plaintiff supplied did not indicate that he was unable to work in any occupation, that Plaintiff's medical records were untimely, and that, although the disability purportedly occurred in 1997, Plaintiff continued to work until 2001. (Pl.'s Mem. Opp'n Mot. Summ. J. Ex. 6.) No mention was made of Plaintiff's apparent ineligibility for benefits; indeed, Defendant seems to have proceeded from the position that Plaintiff was eligible,[3] and found reasons to deny the claim on the merits of Plaintiff's evidence. Allowing Defendant to raise a new basis for denial at this stage in the proceedings would deprive Plaintiff of the procedural protections provided by ERISA. Thompson v. Life Ins. Co. of N. Am., No. 01-1383, 2002 WL 337055, at *2 (4th Cir. March 4, 2002); see 29 U.S.C. § 1133 (requiring written notice of the "specific reasons" for denial of a claim, "written in a manner calculated to be understood by the participant"). Simply stated, this court "may not consider a new reason for claim denial offered for the first time on judicial review." Thompson, 2002 WL 337055, at *2.

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[3] Even more telling, perhaps, is a letter Plaintiff received from Lynn Langelier, an executive assistant with LIN Broadcasting. That letter stated that "the committee is considering an amendment to the plan that would limit disabilities to employees actively working for the company at the time of the disability." (Pl.'s Mem. Opp'n Mot. Summ. J. Ex. 9.) This letter may not be a binding interpretation of the Plan, but it certainly indicates that there was some confusion regarding whether the Plan actually precluded Plaintiff's eligibility as Defendant now argues.

C. Defendant's Denial of Benefits

In denying Plaintiff's claim, Defendant essentially decided that Plaintiff was not disabled as defined by the Plan. The Plan defines Disability as:

> [p]hysical or mental incapacity which is likely to be permanent and which prevents a Participant from engaging in any occupation or performing any work for compensation or profit for which he is qualified by education, training or experience, as determined by the Committee in its sole discretion on the basis of medical evidence certified by a physician or physicians certified by it.

(Pl.'s Mem. Opp'n Summ. J. Ex. 2 at 2.) In support of his claim, Plaintiff originally submitted the reports of three medical professionals: Stephen Prefer, D.C., Sidney Loxley, M.D., and Spencer Johansen, D.C. After the denial of his claim, Plaintiff submitted a narrative prepared by Michael Willenborg, M.D. All of these reports agree that Plaintiff suffers from chronic, severe back pain and several related conditions. None of these reports, however, conclusively establish that Plaintiff is disabled within the meaning of the Plan.[4] Dr. Loxley, for

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[4] In his brief in opposition to Defendant's motion for summary judgment, Plaintiff objects to the use of the term "total disability." Plaintiff argues that the Plan makes no mention of a "total disability" requirement. Plaintiff is correct as a technical matter; the Plan requires only a disability as defined above. Nonetheless, it is not improper for Defendant to discuss "total disability" in his brief because he is describing cases in which the relevant plans used the phrase "total disability" and had a definition similar to the definition of the term Disability as in this case. See, e.g., Elliott v. Sara Lee Corp., 190 F.3d 601, 603 n.1 (4th Cir. 1999) ("total disability" defined as "the continuous inability of the employee to engage in each and every occupation or employment for wage or profit for which he or she

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example, described Plaintiff as having "limited work capabilities," requiring no overhead work, no repetitive bending, and lifting limited to 20 pounds. (Def.'s Mot. Summ. J. Ex. C3.) Dr. Loxley also recommended that Plaintiff be able to lie down during the day to rest his back. (Id.) Dr. Willenborg made similar recommendations, suggesting no heavy lifting (more than 25 pounds), no bending or stooping, and no more than four hours of standing at any one time. (Id. Ex. C8.) None of the evidence Plaintiff submitted with his claim showed that he was prevented from "engaging in any occupation or performing any work for compensation or profit for which he is qualified by education, training or experience." Instead, Plaintiff's evidence showed that, at most, Plaintiff was limited in the work he could perform. See Elliott v. Sara Lee Corp., 190 F.3d 601, 606 (4th Cir. 1999) (concluding that the plaintiff had not shown a total disability as required by the plan, even where one of her physicians found it difficult to determine when she would be able to return to work full time, because all of the medical evidence presented showed that the plaintiff could perform at least some work, including clerical or administrative tasks). Based on this evidence, Defendant concluded that Plaintiff did not meet the

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is reasonably qualified by education, training or experience"); Williams v. UNUM Life Ins. Co. of Am., 250 F. Supp. 2d 641, 644 (E.D. Va. 2003) (long-term disability attached when claimant was "unable to perform the duties of any gainful occupation for which [the claimant is] reasonably fitted by education, training or experience") (alteration in original).

definition of Disability. Plaintiff has submitted no additional evidence to this court that suggests Defendant's reading of the original evidence was an abuse of discretion.[5]

Plaintiff also contends that Defendant abused his discretion by taking into consideration Plaintiff's apparent failure to file an application for Social Security disability benefits with the Social Security Administration.[6] Plaintiff argues that including

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[5] Although the court cannot consider new evidence when reviewing a decision for abuse of discretion, see Sheppard & Enoch Pratt Hosp. v. Travelers Ins. Co., 32 F.3d 120, 125 (4th Cir. 1994) (holding that while "it may be appropriate for a court conducting a de novo review of a plan administrator's action to consider evidence that was not taken into account by the administrator, the contrary approach should be followed when conducting a review under . . . the abuse of discretion standard"), additional evidence submitted by Defendant reinforces his decision. In depositions, Plaintiff's medical care providers confirmed that their recommendations for Plaintiff did not restrict him from performing any job. (See Def.'s Mot. Summ. J. Ex. D at 34-35; Ex. E at 37-40; Ex. F at 42-43.) Moreover, Dr. Frank Rowan, a physician chosen by Defendant to examine Plaintiff after he filed his appeal, did not find the previous providers' restrictions unreasonable, and opined that Plaintiff "is certainly qualified for a light-duty PDL [physical demand level work], and he may be qualified for a great deal more" depending on what a more thorough examination showed. (Id. Ex. C11 at 3.) Finally, Defendant submitted the report of Maria Vargas, a vocational rehabilitation therapist, who, after reviewing Plaintiff's medical history and his past work experience, concluded that there are a variety of occupations available to Plaintiff in the Greensboro-Winston-Salem-High Point metropolitan area. (Id. Ex. C12 at 3-4.) This newer evidence confirms the correctness of Defendant's original determination. Nonetheless, the medical evidence before Defendant at the time benefits were denied was sufficient to permit a reasoned decision and to provide this court with adequate information to review the decision for abuse of discretion. See Elliott, 190 F.3d at 609.

[6] At the time Defendant made his decision, he believed Plaintiff had not filed for Social Security benefits. Defendant (continued...)

a requirement not found in the Plan's definition of Disability is an abuse of discretion. Plaintiff is correct that the Plan's definition of Disability includes no specific requirement that a claimant file an application for Social Security benefits. On the other hand, it does not appear that the failure to file such an application was the primary reason Defendant denied Plaintiff's claim. The denial letter from Defendant to Plaintiff indicates that the failure to apply for Social Security benefits was considered "strong evidence" against Plaintiff's claim, but the letter also notes other significant reasons, including the fact that Plaintiff's medical evidence did not sufficiently establish a disability. (Pl.'s Mem. Opp'n Summ. J. Ex. 6.) Moreover, Defendant has indicated that he never denies benefits to participants "based solely on their failure to provide a Social Security Administration Determination of disability," and that such a failure was not the sole basis for the denial of Plaintiff's claim in this case. (Pl.'s Reply Br. Supp. Cross-Mot. Summ. J. Ex. A. (Def.'s Ans. to Pl.'s First Set Interrogs. ¶ 14).)

The Fourth Circuit has suggested that, although a Social Security Administration ruling is not binding on a plan

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[6](...continued)
later learned that Plaintiff had filed for such benefits in 1997 and had been denied. (Def.'s Mot. Summ. J. Ex. C14 at 9.) At the time of Defendant's decision, however, he was not aware of this denial or the falsity of Plaintiff's representation that he had not filed for such benefits. (Def.'s Mem. Supp. Mot. Summ. J. at 11 n.1.)

administrator or court, consideration of such a ruling is not impermissible, although some regard should be given to the similarity between the definition of disability used by a given plan and the Social Security Administration.[7] See Elliott, 190 F.3d at 607 ("Since Social Security determinations are not binding on the Appeal Committee and there is no indication that the disability standards are analogous, the Plan Administrator was under no obligation to weigh the agency's disability determination more favorably than other evidence."). The court cannot say that Defendant's consideration of Plaintiff's apparent lack of a Social Security filing was an abuse of discretion, particularly in light of the other evidence considered by Defendant which conclusively leads to the same result. As such, the court concludes that Defendant did not abuse his discretion in denying Plaintiff's application for disability benefits. Plaintiff's claim under ERISA therefore fails as a matter of law.

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[7] The Social Security Administration's basic definition of disability is "the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 20 C.F.R. § 404.1505(a). In addition, the applicant must be "unable to do [his] past relevant work or any other substantial gainful work that exists in the national economy." Id. (internal citations removed). The court need not determine whether this definition is sufficiently similar to the Plan's definition, since there was no Social Security Administration ruling to be considered when Defendant made his determination. See Elliott, 190 F.3d at 607.

III. CONCLUSION

For the reasons stated herein, Defendant's Motion for Summary Judgment will be granted, and Plaintiff's Cross-Motion for Summary Judgment will be denied. A judgment in accordance with this memorandum opinion shall be filed contemporaneously herewith.

This the 14th day of June 2004.

William L. Osteen
United States District Judge